80-535

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80 . . . .

CONCERNED PARENTS & CITIZENS FOR THE CONTINUING EDUCATION AT MALCOLM X (P.S. 79), et al.,

Petitioners,

-against-

THE NEW YORK CITY BOARD OF EDUCATION, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80. . . .

CONCERNED PARENTS & CITIZENS FOR THE CONTINUING EDUCATION AT MALCOLM X (PS 79); TONI FRANKS individually and as next friend of TONY FRANKS; GEORGIA KEY individually and as next friend of TYRONE KEY; INA WILLIAMS individually and as next friend of DETRA WILLIAMS; EVA KILLING VARGAS individually and as next friend of EDRA VARGAS; LOUISE WATSON individually and as next friend of JOHN WATSON; MATTIE MITCHELL individually and as next friend of ANTHONY EDWARD MITCHELL;HELEN ROBERTS individually and as next friend of BERNADETTE ROBERTS,

Petitioners,

-against-

THE NEW YORK CITY BOARD OF EDUCATION; FRANK J. MACCHIAROLA individually and as Chancellor of the New York City Board of Education; JERRY C. GROSS individually and as Executive Director of the Division of Special Education of the New York City Board of Education; THE BOARD OF TRUSTEES OF COMMUNITY SCHOOL DISTRICT #5; WILLIAM ALLEN, SNOWDEN E. EICHELBERGER, LORRAINE C. HALE, JEAN A. HIGGINS, BARBARA C. JOHNSON, and THEODORE MEEKINS individually and as members of the Board of Trustees of Community School District #5,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit rendered herein on July 8, 1980.

OPINIONS BELOW

The opinions of the lower courts are not yet reported. The opinion of the Court of Appeals for the Second Circuit is reproduced beginning at page 1a of the appendix; the opinion and order of the District Court for the Southern District of New York are reproduced beginning at page 16a thereof.

JURISDICTION

The judgment of the Court of Appeals was rendered and entered on July 8, 1980. The jurisdiction of this Court to review that judgment rests on 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Second Circuit erred in holding that the Education for All Handicapped Children Act of 1975 requires prior notice and an opportunity to be heard only when an educational agency proposes to alter the program classification of handicapped children, but not when the agency significantly changes the quality of the education of these children without changing their classification.

2. Whether, on the facts of this case, the Court of Appeals for the Second Circuit erred in finding that no change in placement or in the provision of a free appropriate public education had occurred sufficient to trigger the prior notice and hearing requirements of the Education for All Handicapped Children Act.

STATUTORY PROVISIONS INVOLVED

Education for All Handicapped Children Act, Pub.L.No. 94-142, 89 Stat. 775 (codified at to U.S.C. §§1405-06, 1415-20).

20 U.S.C. §1415 Procedural Safeguards:

(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b)(1) The procedures required by this section shall include, but shall not be limited to-

* * *

(C) written prior notice to the parents or guardian of the child whenever such agency or unit-

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to be so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

* * *

(e)(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

STATEMENT OF THE CASE

Petitioners (hereinafter referred to as plaintiffs) commenced this class action to challenge the transfer of 185 mentally and emotionally handicapped children from their special education classes at P.S. 79 in Manhattan to new placements in a number of schools throughout Community School District #5. Plaintiffs claim that this transfer constituted a change in placement or in the free appropriate public education of the children without prior notice or hearing in violation of the Education for All Handicapped Children Act of 1975, 20 U.S.C. §1405 et seq. (hereinafter "EHA"), as well as the Rehabilitation Act of 1973, 29 U.S.C. §701 et seq., and state law.

Plaintiffs moved by order to show cause for a temporary restraining order and preliminary injunction enjoining defendants to return the plaintiff children to P.S. 79 pending a final disposition of the action. This relief was necessary to reverse defendants' violation of the statutory requirement that children remain in their current placements pending provision of notice of a proposed change and opportunity for a hearing. 20 U.S.C. §1415(e)(3). Plaintiffs further requested that, if the court declined to restore the children temporarily to P.S. 79, it should order that the programs, services, and activities previously offered at P.S. 79 be continued for the children at their current placements pending final determination of the action or provision of the required hearings. The District Court immediately granted a temporary restraining order prohibiting the defendants from making any structural modifications in P.S. 79 that would prevent the restoration of the plaintiff children to that facility and scheduled a prompt hearing on plaintiffs' motion for class certification and a preliminary injunction.

At the evidentiary hearing, plaintiffs presented evidence comparing P.S. 79 with the schools to which the students were transferred by reference to several factors central to a handicapped child's educational placement and to the provision of a free appropriate public education. The four major factors by which the schools were compared are: the programs, services and activities provided to disabled children; the physical facilities; the composition of classes and the assignment of teachers; and the integration of handicapped with non-handicapped students.

The testimony of plaintiffs' witnesses established that the plaintiff children were subjected to substantial changes in these four factors as a result of the transfer from P.S. 79. Many of the programs and activities offered to all students at P.S. 79 are currently unavailable to the handicapped children at their new placements, and defendants concede these offerings will only be selectively available in the future. Similarily,the new placements lack some of the support services and special programs for the handicapped that had been available at P.S. 79. For example, plaintiffs' witnesses testified that psychologists, social workers, and crisis intervention teachers are less accessible in the new placements and that special reading programs are no longer offered. Unlike P.S. 79, some of the new placements lack gymnasiums or other facilities equipped for the physical education of handicapped students. Moreover, some of the classes at P.S. 79 were not transferred with their teachers from P.S. 79 and in some instances classes were broken up altogether and children were placed in classrooms with new teachers and different classmates. Plaintiffs presented evidence indicating that in the new placements the handicapped children are largely segregated from the non-handicapped students. This segregation includes, for example, eating during different lunch periods, participating in separate gym classes, and using separate lavatory facilities.

Defendants' witnesses testified that the classifications of the children were not changed in the process of the transfer. Thus, for example, if a child had been in a class designated as "NIEH" for the neurologically impaired, emotionally handicapped at P.S. 79, that child was assigned to the same general type of class in one of the new schools. Therefore, the subjects offered within the classroom would presumably remain consistent. However, defendants did not rebut plaintiffs' showing that the practical effect of the changes both in and outside the classroom was to reduce the quality of education for these children.

In light of the evidence presented by plaintiffs regarding the actual cumulative impact of the changes on the handicapped children, the District Court found that the transfer implemented by the defendants violated the procedural protections afforded to the plaintiffs: the transfer constituted a change in placement that should have triggered the due process procedures In so holding, the District Court defined a "change in placement" as a significant alteration in the programs activities, or services provided by defendants to handicapped children, including changes in the degree to which handicapped children are integrated with non-handicapped children in these programs and activities, as well as significant changes in curriculum, extra-curricular offerings, class composition, and teacher assignments. The District Court, in looking at these factors—all of which are important to the education of a handicapped child and some of which are explicitly identified by the regulations or case law as being components of an educational placement—adopted a practical approach mandated by the language and legislative history of the EHA.

The District Court also found that defendants had no knowledge of the programs offered to the plaintiff children at P.S. 79 and did not consult special education teachers or supervisors prior to implementing the changes. Consequently, defendants did nothing to minimize the adverse impact of the changes on the education of these children.

Although it recognized that the "stay put" requirement of 20 U.S.C. §1415(e)(3) had been violated, the District Court declined to require defendants to restore the plaintiff children to P.S. 79 pending final determination of the action. Instead, it sought to redress this violation and restore the status quo ante by ensuring that the children would receive educational offerings equivalent to those that they had been provided at P.S. 79 until the case was finally resolved. The Court therefore issued a preliminary injunction enumerating the programs, services, and activities provided at P.S. 79 and requiring defendants to provide similar or equivalent offerings at the new placements pending further proceedings. This order further required integration of handicapped with non-handicapped children in the new locations and created a reporting requirement for monitoring compliance with the order.

Defendants appealed from this order, and on July 8, 1980, the Second Circuit reversed and remanded the case to the District Court and dissolved the preliminary injunction. In making this determination to reverse, the Court held that the term "educational placement" refers only to the general type of educational program in which a child is placed. Thus, according to the Second Circuit, only actions such as the transfer of a child from a class for the mentally retarded to one for the emotionally disturbed would constitute a change in placement triggering the prior notice and hearing requirement. In all other cases, parents and their handicapped children would be relegated to seeking reversal of an action already taken by initiating a subsequent administrative review. Since, in the instant case, the handicapped children nominally remained in the same general types of programs, the Second Circuit reasoned that no change in educational placement had occurred.

Plaintiffs seek review of the opinion and judgment of the Court of Appeals for the Second Circuit.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS ISSUES OF BROAD PUBLIC IMPORTANCE BECAUSE THE COURT OF APPEALS HAS RESTRICTIVELY INTERPRETED THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT OF 1975 IN A MANNER CONTRARY TO THE LANGUAGE AND LEGISLATIVE HISTORY OF THAT FEDERAL STATUTE.

Congress has recognized the need to provide an appropriate education to the eight million handicapped children in this country, more than half of whom were not receiving adequate education services as recently as 1975. Sen. Rep. No. 94-168, p. 8; U.S. Code Cong. & Admin. News, p. 1432 (1970). As the Court of Appeals for the Second Circuit acknowledged, the instant case presents a "new and complex" question regarding the interpretation of the Education for All Handicapped Children Act of 1975 and thus has potentially widespread impact. As the briefs submitted by both parties to the Court of Appeals indicate, there is virtually no case law defining what constitutes a change in educational placement or in the provision of a free appropriate public education. In light of this definitional gap, it is incumbent upon any court or administrative agency faced with the task of defining these terms to formulate an ad hoc interpretation without the benefit of generally accepted standards or guidelines.

The Second Circuit's decision emasculates the EHA and frustrates the intent of Congress. If allowed to stand, this decision will permit substantial detrimental changes to be made in the education of countless handicapped children without the prior parental input mandated by Congress.

The Education for All Handicapped Children Act of 1975 requires prior written notice and a hearing whenever an educational agency:

"(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation or

educational placement of the child or the provision

of a free appropriate public education to the child."

20 U.S.C. §1415(b)(1)(C).

Plaintiffs contend, and the District Court agreed, that the term "educational placement" should be construed realistically to include consideration of such factors as the programs, services, and activities provided, the physical facility, class composition, teacher assignment, and integration with non-handicapped students. The statutory language as well as the legislative history establish that a determination of whether a change in placement has occurred requires a review of all these factors.

According to the Second Circuit's restrictive construction of the term "educational placement", however, changes in the nature and quality of the educational program provided to handicapped children would never constitute a change in placement triggering the prior notice and hearing requirements. Only alterations in program classification would be encompassed by the statutory language.

Further, in applying its narrow definition of the term "educational placement," the Court of Appeals ignored the crucial parallel language in the statute which requires prior written notice and a hearing where there is a change in the "free appropriate public education" provided a handicapped child. 20 U.S.C. §1451(b)(1)(C). This language reflects Congress' intent that the purpose of the prior due process procedure is to safeguard the right of handicapped children to an appropriate education as well as to prevent misplacement resulting from improper evaluation or mis-identification of the child. Boxall v. Sequoia Union High School District, 464

F.Supp. 1104, 1108-09 (N.D. Cal. 1979); Lora v. Board of Education, 456 F.Supp. 1211, 1227 (E.D.N.Y. 1978) rev'd on other grounds, ___F.2d___, slip op. no. 620 (2d Cir. June 2, 1980); Sen. Rep. No. 94-168, p. 8 (1975); Sen. Conf. Rep. No. 94-455, pp. 48-49 (1975); U.S. Code Cong. & Admin. News. pp. 1432, 1501-02 (1975); Note, Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975, 92 Harv.L.Rev. 1103, 1106, 1111-12 (1979).

Further support for this interpretation of congressional intent is found in the legislative history which indicates that one of Congress' purposes in establishing the procedural safeguards was to ensure against the arbitrary modification of services. Sen.Rep.No. 94-168, p. 11 (1975); U.S. Code Cong. & Admin. News, p. 1435 (1975). By ignoring that part of the statutory language which requires prior written notice and a hearing when an educational agency initiates a change in the provision of a "free appropriate public education", the Second Circuit flouted congressional intent.

If the Second Circuit had not disregarded this portion of the statutory language, it would have found, as did the District Court, that defendants violated plaintiffs' procedural rights. It is clear from the statute and its implementing regulations that the provision of a "free appropriate public education" means special education and related services provided in accordance with each child's individual educational program. 20 U.S.C. §1401(18). The legislative history, the regulations, and case law all identify elements of special education and define "related services." Specifically, the regulations mandate that special education include physical education and extra-curricular activities including athletics, recreation, and special interest clubs or groups. See Sen.Rep.No. 94-168, pp. 12-13 (1975); U.S.

Code Cong. & Admin. News, pp. 1436-37 (1975); 45 C.F.R. §§121a.4, 121a.14, 121a.305, 121a.307; New York State Ass'n for Retarded Children v. Carey, 612 F.2d 644, 650-51 (2d Cir. 1979). The provision of "related services" including counseling services, social work services, parent counseling and training, psychological services, and recreation is also mandatory. 45 C.F.R. §121a.13.

Furthermore, the regulations prescribe that the educational placement decision for each child (including the type of classroom and school) must result in placement in the least restrictive environment on a continuum of educational placements appropriate to the needs of the handicapped child. 45 C.F.R. §121a.552. See New York State Ass'n for Retarded Children Inc. v. Carey, 466 F.Supp. 487, 496-97 (E.D.N.Y. 1979); aff'd 612 F.2d 644 (2d Cir. 1979); Lora v. Board of Education, 456 F.Supp. at 1264-67; 45 C.F.R. Pt. 84 App. A at 388-9 (1979); Sen.Rep.No. 94-168, p. 8 (1975); U.S. Code Cong. & Admin. News, p. 1432 (1975). The regulations specifically require that the interaction between handicapped and non-handicapped children be permitted to take place outside the formal setting of the classroom. Non-academic and extra-curricular activities including meals, recess periods, counseling, physical and recreational activities, health services and special interest groups are identified as programs in which maximum integration is required. 45 C.F.R. §§84.34 and 84.37(a)(2). Likewise, the composition of classes and the assignment of teachers are integral components of a "free appropriate public education."

Plaintiffs presented evidence, which both the District and Circuit Courts accepted, that plaintiff school children were subjected to a reduction in services and programs, a curtailment of extra-curricular activities, a disruption of student-teacher relationships, and segregation from non-handicapped children. Where, as in the instant case, there are substantial changes in those elements which comprise a free appropriate public educaiton, it follows that the cumulative effect must be a change in the provision of a "free appropriate public education," sufficient to trigger the prior notice and hearing requirements of the EHA.

Even if the Court of Appeals for the Second Circuit had not erred by ignoring a segment of the relevant statutory language, its definition of the term "change in educational placement" is nonetheless contrary to the intent of Congress and to the implementing regulations. In holding that only a change in program classification could trigger the prior notice and hearing requirements of the EHA, the Court mistakenly focused on one out of several legislative purposes underlying that statute. It is clearly correct, as the Court noted, that Congress was concerned with the misclassification of children. However, this was hardly Congress' sole concern. Congress was aware of the need to guarantee the nature and quality of education for handicapped children, and it therefore included as a predicate for the prior due process rights any general " change in placement" as well as changes in "identification" or "evaluation". Sen.Rep.No. 94-168, pp. 8, 29 (1975); Sen.Conf. Rep. No. 94-455, pp. 48-49 (1975); U.S. Code Cong. & Admin. News pp. 1432, 1453, 1501-02 (1972).

Contrary to the rationale of the Second Circuit, the regulations implementing the EHA support a definition of "change in placement" that focuses on the actual educational impact. The Court of Appeals noted that these regulations use the term "placement" in reference to the requirement for providing handicapped children with the least restrictive educational environment. See 45 C.F.R. §121a.551. Since this regulatory section cites five potential levels of placement — regular classes, special classes in regular schools, special schools, home instruction, and instruction in hospitals and institutions—the Court reasoned that "placement" refers only to such broad categories. But the inaccuracy of this interpretation of the regulations is illustrated by the regulation immediately following, entitled "placememts." 45 C.F.R. §121a.552. This section requires, inter alia, that each child's placement shall be determined

in accordance with his or her individualized education program. Thus, it contemplates that placement shall be based on a constellation of factors far broader than those used in determining merely whether the child belongs in a special school or a regular school. See 45 C.F.R. §121a.340 et seq.

Finally, a recent policy memorandum issued by the Office for Civil Rights of the Department of Health, Education, and Welfare supports a definition of a change in placement that takes into account the overall educational impact on the children. OSPR 1/1/45, 2 EHLR 259:05 (reproduced beginning at page 36a of appendix). In that memorandum, the Office for Civil Rights found that the transfer of handicapped children from one school district to another constituted a change in placement. In so holding, it stated: "Ordinarily, a mere change in the physical location will not be a significant change in educational placement, unless there are changes in the nature or quality of the educational services being delivered." (emphasis added). Here, the District Court properly analyzed the nature and quality of of the educational services provided to the plaintiff children and found that a change in placement had occurred.

The Second Circuit compounded its error when it inexplicably introduced the element of intent into its analysis. It asserted that defendants acted in good faith and did not intend to alter the placements of the plaintiff children. Neither the statute nor the legislative history nor the regulations hint that the intent of an educational agency or its good faith vel non is relevant to a determination of whether prior notice and an opportunity to be heard are required. The statutory language is clear on its face: the standard is an objective one. Yet even if the intent of defendants here were relevant, their reckless indifference to the results of their decision to transfer the plaintiff children amounts to bad faith. The Court

of Appeals did not overturn the District Court finding that the relevant Board of Education officials had no knowledge of the kind and quality of the programs offered to the plaintiffs at P.S. 79 and did not consult the children's teachers or special education supervisors to determine the advisability and impact of implementing such radical changes. Therefore, even if the degree of culpability is a relevant factor, the due process protections should have been triggered in this instance.

The Second Circuit's interpretation opens the EHA to potential abuse by educational agencies. By endorsing the defendants' position that the only crucial factor in a "change in placement" is whether the label assigned to the child has been altered, the Court has merely shifted the inquiry to whether the categories adopted by an agency for the classification of handicapped children are defined with sufficient precision. Here, for example, the plaintiffs remained in special classes within regular schools following their transfers. Nevertheless, the District Court found that the children were "virtually isolated" in their new placements. Thus, defendants accomplished the same result without altering the classification of the children that they might have accomplished had they transferred the children to a school composed solely of special education classes. However, because the Second Circuit's standard focuses exclusively on the labels of convenience assigned to the students, the Court failed to acknowledge that a fundamental change had occurred in the education of these children. Such a result contravenes the intent of Congress to provide for notice and an opportunity to be heard before such changes are accomplished.

In support of its narrow interpretation of the term "change in placement", the Court of Appeals advanced several policy arguments. First, it expressed a fear that broad application of the prior notice and hearing requirement would hamper the ability of educational agencies to administer programs for the handicapped. This concern is unfounded. The District Court examined a range of factors, many referred to explicitly in the statutory and regulatory scheme, and found that in combination these factors led to the conclusion that a change in placement had occurred. No single factor was dispositive. Under this analysis, school administrators remain free to make most changes in the programs or assignments of students without prior notice or hearing. They are barred only from making the kind of precipitous and wide-ranging alterations in the placement of handicapped children that occurred here without first providing notice and an opportunity to be heard.

In most cases educational experts will be able to predict whether anticipated alterations will affect the basic education of handicapped children. Here, for example, defendants could have anticipated that the precipitous transfer of 185 children to several schools, in some cases requiring reassignment of students and teachers and accompanied by radical program changes, would disrupt the education of the children. However, since defendants failed to consult even their own special education experts prior to the transfer, they took no steps to minimize the educational impact on the children. Of course, in some borderline cases the question of whether a child's placement is functionally changed by proposed alterations in his or her program will be a close one that may ultimately be litigated. However, the existence of such close cases is not justification for flouting the intent of Congress to provide procedural protections by interpreting those protections to apply in only the narrowest class of cases.

The Second Circuit asserted, however, that the order of the District Court in this case illustrated the potential vagueness of that Court's construction of the statute. Contending that the District Court's order implied that each of twenty-two programs and acitvities was a necessary part of the plaintiffs' placements, the Circuit concluded that such a definition of "placement" was unwarranted and would be burdensome on educational agencies. This analysis is erroneous for two reasons. First, there is no indication whatsoever that the District Court considered each individual program a necessary element of the placements. On the contrary, the District Court's conclusion that a change in placement had occurred was based on its consideration of all of the changes in plaintiffs' educational programs taken in combination. Second, the specificity of the District Court's order was a response to the defendants' having ignored the stay-put requirement of the statute. In its attempt to restore the status quo ante, the Court enumerated the programs that had been offered at P.S. 79, and required defendants to provide the same or equivalent programs until plaintiffs were given an opportunity to challenge the proposed change in placement. Defendants did challenge this order as overbroad, but the scope of the order is not, as the Court of Appeals implied, relevant to a determination of whether the District Court's statutory interpretation is valid.

Finally, the Court of Appeals suggested that plaintiffs suffer no detriment as a result of the limitation on their right to prior notice and an opportunity to be heard. The Court reasoned that parents of handicapped children remain entitled to file administrative complaints concerning any matter relating to the current placements. Yet, if Congress had considered

such administrative complaints sufficient, it could have dispensed with the prior notice and hearing requirements altogether. Thus, the very existence of the prior notice requirement belies the Court of Appeals' argument. Furthermore, the presumption that each educational element of which children have been deprived can be restored after an administrative hearing has been held ignores educational reality. Here a cohesive educational program was disrupted and the children scattered to a number of different schools before parents had an opportunity to raise objections. Now it is beyond question that many of the programs available to the plaintiff children in their prior placement cannot be resurrected. The District Court found it infeasible to return the children to the original physical facility, and the defendants have consistently argued the impossibility of duplicating many of the programs that had previously existed. Thus, it is unrealistic to believe that the opportunity for individual, parent-initiated hearings following the accomplishment of radical educational changes can adequately protect the rights of handicapped children. It is for precisely that reason that Congress adopted the prior notice and hearing requriement when a change in placement is anticipated, and it is for that reason that the term "change in placement" must be construed in a manner more consistent with educational reality.

The District Court, then, properly held that these children had been deprived of the opportunity for prior notice and a hearing. As the District Court found, the quality of education for the handicapped at the new placements was far inferior to that at P.S. 79. Many specific programs were curtailed, and defendants presented no evidence that substitute programs would be offered in the future. Without consultation of special education

experts, children were separated from their prior teachers and classmates. In the new schools the handicapped children were "virtually isolated" from non-handicapped children. None of these findings were overturned by the Court of Appeals. Therefore, if the Court of Appeals had applied a legal standard consistent with the language and legislative history of the Education for All Handicapped Children Act, it would have concluded, as did the District Court, that the due process requirements had been violated.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
October 3, 1980

Respectfully submitted,

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Appendix A - Opinion, United States Court Of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1263—September Term 1979

Argued May 30, 1980 Decided July 8, 1980

Docket No. 80-7300

CONCERNED PARENTS & CITIZENS FOR THE CONTINUING, EDUCATION AT MALCOLM X (PS 79), et al.,

Plaintiffs-Appellees,

—against—

THE NEW YORK CITY BOARD OF EDUCATION; FRANK J. MACCHIAROLA individually and as Chancellor of the New York City Board of Education, et al.,

Defendants-Appellants.

B e f o r e :

FEINBERG, *Chief Judge,*
NEWMAN and KEARSE, *Circuit Judges.*

Appeal from order of the United States District Court for the Southern District of New York, Robert L. Carter, J., enjoining defendants for failure to comply

with provisions of the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401 et seq.

Reversed and remanded.

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FEINBERG, *Chief Judge*:

This case involves the interpretation of the Education for All Handicapped Children Act of 1975, one of the many recent congressional enactments that bring new and complex questions into the federal courts. The New York City Board of Education and various Board officials and trustees (hereafter collectively referred to

as the Board) appeal from an order entered in the United States District Court for the Southern District of New York, Robert L. Carter, J., holding that the Board had violated the Act by transferring approximately 185 handicapped children from Public School 79 to other schools in Manhattan School District 5 without providing adequate prior notice and a hearing to the parents or guardians of such children. The court's order compelled the Board to provide the transferred students with "those curricular and extra-curricular programs and related services which were available to plaintiff children at P.S. 79." For reasons stated below, we hold that the transfer did not violate the Act and we reverse the order of the district court.

I

The facts of this case may be briefly summarized as follows. In the summer of 1979, the Trustees of School District 5 decided to close P.S. 79 for budgetary reasons.[1] Approximately 185 of the 310 students at P.S. 79 were handicapped children enrolled in special education classes, and the Division of Special Education determined that these students should begin the coming school year at their new locations rather than face disruption in the middle of the term. Thus, in late

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1 Board officials from School District 5 testified that they had originally hoped to avoid a school closing, and, upon learning of the funding limitations for the 1979-80 school year, immediately sought input from the community on ways to avoid such a closing. Several public meetings were held in May 1979 for this reason. However, it was ultimately determined that the closing of one school was preferable to the drastic reduction of support services at all 21 schools in the district. P.S. 79 was selected apparently because it was underutilized and suffered from a declining enrollment.

August 1979, the Board endeavored to notify the parents of children attending P.S. 79 that the school was being closed and that the students would be transferred to other schools within the district, with teachers and their classes being kept intact as much as possible. The transfer was marred, however, by several bureaucratic mix-ups, and the Board was not entirely successful in assuring that teachers and their classes remained together.[2]

In November 1979, plaintiffs in this case—a group of handicapped students at P.S. 79, their parents and guardians, and an unincorporated association formed to preserve quality education for the students—filed this action against the Board, alleging that the transfer of handicapped students from P.S. 79 had violated the Due Process clause of the Fourteenth Amendment, the Education for All Handicapped Children Act of 1975, 20 U.S.C. 1401 et seq., the Rehabilitation Act of 1973, 29 U.S.C. § 794 and various provisions of the New York Education Law. Plaintiffs sought class certification, declaratory relief, and an injunction compelling the return of the plaintiff children to P.S. 79. District Judge Carter enjoined the Board from making structural modifications of P.S. 79 that would prevent the return of plaintiff children to the school should they ultimately prevail on the merits, and promptly held a hearing on plaintiffs' request for class certification and a preliminary injunction. In early February 1980, Judge Carter orally granted plaintiffs' motion for a preliminary injunction; rather than requiring the return of

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2 The most notable error was the transfer of a group of ten to twelve year olds to P.S. 36, which was equipped for only very young children. The Board has since corrected this mistake.

plaintiff students to P.S. 79, however, the district court ordered the Board to provide the students at their new schools with educational programming equivalent to what they received prior to the transfer. On February 27, 1980, the court issued a written opinion which described the "extremely innovative educational program" previously provided to handicapped children at P.S. 79 and detailed the trauma caused by the transfer and the inadequacy of some of the new assignments. The court concluded that the transfer was "made in haste" and "seem[ed] totally at variance with both the letter and the spirit of the federal and state laws designed to provide procedural protection for the handicapped."

On March 31, 1980, the court issued a further, detailed order that held that the transfer constituted a "change in placement" under the Education for All Handicapped Children Act of 1975 (the Act); the order defined a "change in placement" as "any significant alteration in the programs, activities, or services provided by defendants to handicapped children . . . . includ[ing] changes in the degree to which handicapped children are integrated with non-handicapped children in these programs and activities, as well as significant changes in curriculum, extra-curricular offerings, class composition and teacher assignments." The court found that the failure of the Board to provide plaintiffs with notice and a hearing prior to the change in placement violated the procedural provisions of the Act, 20 U.S.C. § 1415. To remedy this violation, the order required the Board to provide the transferred students with a broad array of curricular and extra-curricular programs and services that had previously been available at P.S. 79. The order also set forth the procedural steps that the

Board would be required to follow before making any further "changes in placement," as well as provisions for monitoring compliance. Finally, the order dissolved the temporary restraining order enjoining structural modifications of P.S. 79[3] and granted plaintiffs' motion for class certification. Full implementation of the district court's order has been stayed pending disposition of this appeal.

II

On the record before us, it is clear that the transfer of students from P.S. 79 was poorly planned, and that the move was disconcerting to many of the handicapped children that had attended the school. Moreover, as the district court found, the schools to which the students were transferred do not in all respects duplicate the "extremely innovative educational program" formerly provided to handicapped children at P.S. 79. However, the issue before us is not whether the Board acted wisely or carried out its decision properly. Instead, the narrow question on this appeal is whether the transfer of handicapped children in special classes at one school to substantially similar classes at other schools within the same school district constitutes a change in "placement" sufficient to trigger the Act's prior notice and hearing requirements.

The primary purpose of the Act is to encourage states, through the use of fiscal incentives, to provide a "free appropriate public education" for all handicapped children. See, e.g., 20 U.S.C. § 1412 (1). In furtherance

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3 P.S. 79 is now being changed into a special school for children with multiple handicaps.

of this goal, the Act also embodies a range of procedures designed to ensure that fundamental decisions concerning the education of handicapped children are made correctly and with appropriate input from the parents or guardians of such children. See generally Note, Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975, 92 Harv. L. Rev. 1103 (1979). The interpretation of one such procedural mechanism is at issue here. Pursuant to 20 U.S.C. § 1415(b)(1)(C), whenever an educational agency covered by the Act

> (i) proposes to initiate or *change,* or
>
> (ii) refuses to initiate or change the identification, evaluation, or *educational placement* of the child or the provision of a free appropriate education to the child, (emphasis supplied)

it must provide the parents or guardian of the child with prior written notice. Other subsections of § 1415(b) require the agency to provide parents or guardians in such cases with an opportunity for "an impartial due process hearing." See §§ 1415(b)(1)(D), 1415(b)(2). The statute fails to define "change . . . [in] educational placement". The district court, in concluding that the Board's action violated these procedural requirements, construed the term to encompass the transfer of handicapped students between schools in the same district, as well as any other significant alteration in the curriculum, extra-curricular offerings, support services, class composition, or teacher assignments provided to handicapped children. Although this is a possible reading of the section, we nonetheless believe that the term "educational placement" refers

only to the general type of educational program in which the child is placed. So construed, the prior notice and hearing requirements of § 1415(b) would not be triggered by a decision, such as that made by the Board in this case, to transfer the special education classes at one regular school to other regular schools in the same district.

Several factors support this conclusion. First, in § 1415(b)(1)(C) the term "educational placement" is used in the context of changes in the "identification, evaluation, or educational placement" of the handicapped child. This language suggests that the full notice and hearing requirements of § 1415(b) were limited to certain fundamental decisions regarding the existence and classification of a handicap, and the most appropriate type of educational program for assisting a child with such a handicap. The legislative history of the Act supports this interpretation, for it indicates that a primary concern of Congress in enacting these procedural protections of § 1415(b) was to prevent the erroneous identification or classification of children as handicapped and the impairment of their subsequent education by ensuring that parents would be afforded prior notice and an opportunity to participate in such fundamental determinations. The Senate Report, for example, notes that the Committee on Labor and Public Welfare was "deeply concerned about practices and procedures which result in classifying children as having handicapping conditions when, in fact, they do not have such conditions." S. Rep. No. 94-168, 94th Cong., 1st Sess. 26 (1975), reprinted in [1975] U.S. Code Cong. & Admin. News 1450-51. Thus the reference to "educational placement" in § 1415(b)(1)(C) would appear to refer to the general educational

program in which a child who is correctly identified as handicapped is enrolled, rather than mere variations in the program itself, which the district court apparently believed could constitute a change in placement.

The regulations implementing the Act also interpret the term "placement" to mean only the general program of education. The Act embodies a statutory preference for "mainstreaming," or the maximum possible integration of handicapped children with nonhandicapped children, 20 U.S.C. § 1412(5)(B), and the regulations implementing this preference provide in pertinent part:

> § 121a.551 Continuum of alternative placements
>
> (a) Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services.
>
> (b) The continuum required under paragraph (a) of this section must:
>
> (1) Include the alternative placements listed in the definition of special education under § 121a.13 of Subpart A (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions). . . .

45 C.F.R. § 121a.551. Thus, the regulations use the term "placement" to refer only to the general educational programs provided for handicapped children, and the reference to a "change" in "educational placement" in § 1415(b)(1)(C) would therefore apparently encompass only decisions to transfer a child from one type of program to another. For example, a decision to transfer a handicapped child from a special

class in a regular school to a special school would involve the sort of fundamental alteration in the child's education requiring prior parental notification under § 1415(b).[4]

Finally, strong policy considerations support a restrictive interpretation of the meaning of "educational placement" in § 1415(b)(1)(C). As previously noted, in concluding that the transfer of students from P.S. 79 had violated that section, the district court ordered the Board to make numerous minor alterations and additions in the educational programs of the handicapped children at their new locations. For example, the court ordered the Board to provide the transferred students with, among other things,

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4 In support of their position, plaintiffs rely heavily on a policy memorandum issued by the Office of Civil Rights of the Department of Health, Education and Welfare. The memorandum provides:

> Issue: A change in the location of a special education program as a "change in educational placement."
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> Facts: A school district relocated a special education program which necessitated transferring children from one school district to a separate school district.
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> Decision: In this case, the change in school site does constitute a significant change in the children's educational placement. Ordinarily, a mere change in the physical location will not be a significant change in educational placement, unless there are changes in the nature or quality of the educational services being delivered. The fact that the children in this case are being transferred from one school district to another school district is dispositive. Sending handicapped children out of their own school district for their education is a significant change in placement and therefore necessitates the availability of procedural safeguards.

The memorandum, however, provides little guidance as to the application of § 1415(b)(1)(C) to the present case, both because the memorandum is somewhat ambiguous and because it deals only with interdistrict transfers of students. The transfers here were within the school district.

(a) A peer tutoring program in which handicapped children shall have the opportunity to tutor non-handicapped children;

(b) The Afro American Caravan Program;

. . .

(d) The Young Audience Program;

(e) The World Poets Resource Center;

(f) A science fair;

(g) Choral groups;

(h) Assembly programs in which the handicapped children participate as well as observe;

(i) Dance and art festivals;

(j) A library trip program;

(k) An audio-visual squad;

(l) A school book fair;

(m) Weekly radio broadcasts in conjunction with a local radio station;

(n) The President's Physical Fitness Program;

(o) Basketball and track teams;

(p) Cheerleading squads;

(q) Boy and Girl Scout troops;

(r) Queens College Teacher Corps Program;

(s) City University student-teacher program;

(t) Flower Fifth Avenue On-Site Developmental Disabilities program;

(u) A fully-equipped resource room;

(v) Title I and Title VI reading programs;

(w) Physical education classes.

While not explicitly stated, it appears that the district court considered the removal of any of the above programs, some of which were privately sponsored rather than provided by the Board, to constitute a change in "educational placement" requiring prior

notice and a hearing under § 1415(b). Such an interpretation of the Act would virtually cripple the Board's ability to implement even minor discretionary changes within the educational programs provided for its students; that interpretation would also tend to discourage the Board from introducing new activities or programs or from accepting privately sponsored programs. Further, the educational agency would lack any workable standard for assessing whether a particular contemplated decision might constitute a change in "educational placement." Moreover, given the full hearing required by the section and the right to obtain judicial review of adverse decisions, see § 1415(e)(1), the implementation of such changes could be forestalled indefinitely. More explicit statutory language is required to justify an interpretation that would so constrain the discretion of educational agencies as to when such determinations should be put into effect.[5]

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5 See also Brown v. District of Columbia Board of Education, 3 Educ. of the Handicapped L. Rep. 551:101-:104 (D.D.C. 1978), in which the district court rejected a claim that there had been a change in placement requiring prior notice and a hearing, and noted:

> The regulations seem to use the term "placement" as a substitute for "program" and the Act appears to contemplate use of the due process mechanism only for changes that affect the form of educational instruction being provided to a handicapped child. Thus the Court is inclined to agree with the defendants that transferring the Deaf-Blind Class from the Tyler School to the Sharpe Health School was not a change in placement. To find otherwise could extend the notice and hearing requirements of the Act to situations perhaps not contemplated by Congress and impose a procedural mechanism that could severely limit the administrative discretion of local education authorities. For example, if a change in placement were deemed to occur every time a decision was made that affected the educational experience of a handicapped child, a local board could be prevented from implementing changes in personnel, supportive services, or even class size unless they undertook the procedural requirements of notice and hearing.

Id. at 551:103-:104.

Thus, we conclude that the term "educational placement" refers only to the general educational program in which the handicapped child is placed and not to all the various adjustments in that program that the educational agency, in the traditional exercise of its discretion, may determine to be necessary. Given this interpretation, we do not believe on the record before us that the transfer of students from P.S. 79 constituted a change in placement sufficient to trigger the prior notice and hearing provisions of § 1415(b). The transferred handicapped students remain in the same classification, the same school district, and the same type of educational program—special classes in regular schools. Moreover, although the classes at the new schools may vary in some respects from the somewhat unusual program formerly provided at P.S. 79, there is no suggestion in the record that the Board intended or attempted to alter the placement of any handicapped students by transferring them to other schools within the district. Indeed, the record indicates that the Board, in making the decision to close one school and then planning the transfer of the handicapped students to various other schools in the same school district, made a good faith effort to preserve intact as far as possible the basic educational programs that the transferred children had formerly enjoyed at P.S. 79.[6] Accordingly, we conclude that the Board was not required under the Act to give parents of

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6 Moreover, the transfer may actually further the statutory goal of integrating handicapped children into the regular educational process. See 20 U.S.C. § 1412(5)(B); 45 C.F.R. §§ 121a.550-52. As previously noted, handicapped children made up approximately two-thirds of the class at P.S. 79; at their new locations, they comprise a minority of the student body. Thus, the transfer, if anything, provides the students formerly attending P.S. 79 with greater

handicapped children at P.S. 79 prior notice and a full due process hearing before the transfer of such students to other regular schools within the district.

Our conclusion does not mean, however, that there are no constraints on the power of school boards to close schools and transfer students; we merely hold that under the facts of this case § 1415(b) did not act as such a constraint.[7] Nor do we believe that our decision leaves the parents of transferred handicapped students without means under the Act to redress the alleged deficiencies in the educational programs of the children at their new locations. For example, the Act requires that participating educational agencies provide the parent or guardian of a handicapped child with "an opportunity to present complaints with respect to any matter relating to ... the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(1)(E). The agency is required to address such complaints at a full administrative hearing, and the parent or guardian has a right to judicial review of adverse agency determinations after exhaustion of administrative remedies. 20 U.S.C. § 1415(b)(2)-(e). See also Harris v. Campbell, 472 F.Supp. 51 (E.D. Va. 1979). These procedural protections provide an adequate means by which the parents of the handicapped children transferred from P.S. 79 can seek to insure

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opportunities for interaction with nonhandicapped students and for learning to function in a "normal" environment. And while the district court found six months after the transfer that there was inadequate integration of handicapped and nonhandicapped children, we find no indication in the record that this situation is not amenable to change.

7 In this regard, it should be noted that the Board did seek community input when the closing of a school in District 5 appeared likely.

that schools at which the children were relocated provide an appropriate education. See also 45 C.F.R. §§ 121a.343-45 (1978).

Accordingly, we reverse the order of the district court and dissolve the preliminary injunction.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Appendix B - Opinion, United States District Court for the Southern District of New York

CONCERNED PARENTS & CITIZENS FOR THE CONTINUING EDUCATION AT MALCOLM X (PS 79); TONI FRANKS individually and as next friend of TONY FRANKS; GEORGIA KEY individually and as next friend of TYRONE KEY; INA WILLIAMS individually and as next friend of DETRA WILLIAMS; EVA KILLING VARGAS individually and as next friend of EDRA VARGAS; LOUIS WATSON individually and as next friend of JOHN WATSON; MATTIE MITCHELL individually and as next friend of ANTHONY EDWARD MITCHELL; HELEN ROBERTS individually and as next friend of BERNADETTE ROBERTS,

Plaintiffs,

-against-

79 Civ. 6152 (RLC)

THE NEW YORK CITY BOARD OF EDUCATION; FRANK J. MACCHIAROLA individually and as Chancellor of the New York City Board of Education; JERRY C. GROSS individually and as Executive Director of the Division of Special Education of the New York City Board of Education; THE BOARD OF TRUSTEES OF COMMUNITY SCHOOL DISTRICT #5; WILLIAM ALLEN, SNOWDEN E. EICHELBERGER, LORRAINE C. HALE, JEAN A. HIGGINS, BARBARA C. JOHNSON, and THEODORE MEEKINS individually and as members of the Board of Trustees of Community School District #5.

Defendants.

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CARTER, District Judge

OPINION

I

This action was instituted on November 15, 1979. Plaintiffs moved by order to show cause for a temporary restraining order and preliminary injunction requiring defendants to restore special education classes for handicapped children at Malcolm X Elementary School (P.S. 79) in Community School District #5 in Manhattan, or in the alternative to provide services, activities and programs identical to those that were provided at P.S. 79 for approximately 200 handicapped children transferred from P.S. 79 in September, 1979 to other schools in the district. A temporary restraining order was issued on November 15, 1979, which prohibited defendants from making any structural modifications of P.S. 79 which might render that building unsuitable for use as an educational facility for the handicapped children involved in this proceeding. Hearings on the preliminary injunction were held on November 20, 21, and 29, 1979. Plaintiffs moved for class action determination on November 20. The parties filed their briefs in mid-January. The restraining order enjoining defendants from making modifications in P.S. 79 that would make it impossible to restore the building to its former function was continued in the form of a temporary injunction pending final determination. On January 24, 1980, defendants brought on an order to show cause to vacate the court's injunction. The court was advised defendants were under the orders of another federal court to provide facilities for multiply handicapped children and that defendants desired to utilize P.S. 79 as a self-contained center for the

education of such children. This would require structural changes in P.S. 79 and defendants wished to proceed with making the modifications so that P.S. 79 would be available for the aforesaid purpose sometime in February, 1980. Since the instant case had been fully submitted, the court suggested that rather than deciding the order to show cause the more efficient course was for it to file its findings of fact and conclusions of law in this case at the earliest convenient date. On Tuesday, February 5, counsel for the parties were advised in open court of the court's decision, with a written opinion to follow.

II

Plaintiffs are children with emotional or learning dysfunctions, who prior to September, 1979 were attending special education classes at P.S. 79 which had four types of such classes for the: (1) neurologically impaired, emotionally handicapped ("NIEH"); (2) learning disabled with minimal brain damage ("HC-30"); emotionally handicapped ("CEH"); and (4) retarded mental development ("CRMD"), sometimes designated educable mentally retarded ("EMR").

P.S. 79 is a K-6 facility. The staff at P.S. 79 had developed an extremely innovative educational program for these handicapped children that seems to be fully consonant with the oft-stated basic purpose and aim of both federal and state legislation of insuring appropriate public education for handicapped children in the least restrictive atmosphere--generally described as mainstreaming. The P.S. 79 program also seems to comply with currently accepted methodology for education of the handicapped. See Haggerty and Sacks, Education of the

Handicapped: Towards a Definition of An Appropriate Education, 50 Temp. L.Q. 961 (1977).

A wide range of activities was offered at P.S. 79, and there was such complete integration of the handicapped with the non-handicapped that visitors to the school were unable to tell one from the other. There were Title I and Title VI reading and speech programs available that sought to meet the specific needs of the individual child. In addition to the regular public school special education teaching complement, staff aids were provided under a Queens College teacher and City College student teacher program. There were a number of supplements to regular instructional courses, e.g., the Black Urban Caravan which was designed to bring added insights to courses in history and civics; the World Poets' Resource Center which was structured to supplement classes in English and the arts; a School Science Fair which sought to quicken and further the students' curiosity about developing science technology; and a Dance and Arts Festival which sought to foster freedom of expression among the children.

One of the most innovative mainstreaming activities was a peer tutoring program in which handicapped children tutored non-handicapped children in a variety of academic skills. Indeed both the handicapped and non-handicapped participated in many of the school's activities, and the two groups had lunch, recreation, gymnasium and assembly together during regular school hours; after school opportunities were provided for such continued dual activities in trips, choral groups, sports and a weekly radio broadcast in conjunction with WBAI. A final program that bears mentioning was a pilot project sponsored by the

Division of Psychology in Development Disabilities Center which brought parents, the handicapped children, teachers at P.S. 79 and psychological staff of the Center together in counseling activities to aid the handicapped children enrolled at P.S. 79 in handling their emotional problems.

P.S. 79 served approximately 300 handicapped and non-handicapped children during the 1978-79 school year. There were 7 regular and 20-25 special classes. While the exact number of children in each group was never specifically fixed, it is conceded, I believe, that there were more handicapped than non-handicapped in the total P.S. 79 school population. The estimates range from a high of 200 handicapped and 100 non-handicapped, to figures providing a slightly lower ratio between the two groups.

During the summer of 1979, Community School District #5 learned that its budgetary restraints for the forthcoming 1979-80 school year were to be even more stringent than had been the case for the 1978-79 term. Moreover, the trustees faced a steady decline in enrollment in and the underutilization of all 21 schools in the district. Faced with these realities, the trustees decided that it was not a sound or efficient policy to seek to operate all the schools in the district. P.S. 79 was considered a likely choice for closure because none of the regular classes in that school had been fully enrolled in the 1978-79 school year, and further underutilization in the 1979-80 school year was forecast.

In August, 1979, the decision was made to discontinue special education classes at P.S. 79 and to transfer its handicapped population to special education classes in other schools, preferably in schools which

already had special education classes. A letter was sent out in late August to parents stating that their child would not be attending P.S. 79 in September since that facility was closing, and indicating the new school the child was to attend. The letter stated that teachers and classmates would be moved as a unit. Some parents did not receive this notification, and in some cases learned about the transfer on the day school opened in September when the bus driver arrived to transport the child to school. Some parents were advised by postcard where their child would be sent, others learned the name of the new school from the bus driver when he came to pick up the child on the first day of school.

No prior notice of the impending move or right to due process hearing to contest the change was given to any parent. The parents were not advised that alternatives to the change had been considered, and no opportunity for a hearing prior to the transfer was granted. The children were not transferred to one school but to several--P.S. 194, 200, 129, 46, 36, and 161. In some cases, classmates were separated and teachers were not transferred with their classes. Of 9 teachers in charge of NIEH classes at P.S. 79, 4 went with the children to P.S. 194, 1 to P.S. 200, 1 to P.S. 209 and 3 were lost to the program. Of 8 teachers in charge of HC-30 classes at P.S. 79, 2 went to P.S. 36 and the rest went to positions in other school districts. Of the 5 teachers in charge of EMR-EH classes at P.S. 79, 3 went to P.S. 46 and 2 were lost to the program. Of 4 teachers in charge of CEH classes at P.S. 79, 1 went to P.S. 161, 1 is on leave and 2 did not return.

The transfer to P.S. 36 was conceded by defendants to be a mistake. P.S. 36 is a K-2 school with furniture designed for the very

young, and the differerces in ages between the small children and the 15 older handicapped children assigned there must have made the transfer a highly traumatic experience for the latter. Joyce Coppin, Assistant Superintendent, Division of Special Education, indicated at the November hearing that steps were being taken to rectify that error and to reassign these children to a more suitable facility.

Aside from the particular problem of misassignment to P.S. 36, the transfers were apparently made hurriedly and on the basis of where space was available without careful attention to the individualized needs of the children involved. Nor was there any evidence that the teaching personnel involved in P.S. 79's program were consulted or their advice sought before the transfers were effected.

There is, thus far, less mainstreaming at the new locations than there was at P.S. 79. While defendants question whether P.S. 79 with a handicapped majority accords with the Division definition of optimum mainstreaming--a ratio of 15% handicapped to 85% non-handicapped--at the new locations the handicapped children thus far have been kept virtually isolated from the rest of the school population. Various reasons were given for this, the chief one being that the children were not ready for mainstreaming since they had to be given time to settle into their new locations. The peer tutoring, and staffing aides provided under Queens and City College programs are not in operation at the new locations, and the project of the Division of Psychology in the Development Disabilities Center is not offered at any of the new locations to which the children have been assigned. Nor was there any testimony that such programs were contemplated in the future. Moreover, there was testimony of

demonstrated opposition and hostility at some schools to having the handicapped children there. This hostility was said to come from both adults and children. There was testimony from certain of the children and their parents that the former were unhappy in their new assignments and had been set back emotionally and educationally. Indeed, the testimony of defendants' own witnesses who justified the isolation of the children in the new locations on grounds that they were not ready for mainstreaming supports plaintiffs' contention of the trauma this move has caused among the plaintiff children.

III

Plaintiffs contend that the transfers constituted a change in placement requiring notice and hearing. See New York State Association for Retarded Children v. Carey, 466 F. Supp. 479 (E.D.N.Y. 1978), aff'd, ___ F.2d ___, slip. op. No. 79-7257 (2d Cir. Dec. 10, 1979); Stuart v. Nappi, 443 F. Supp. 1235 (D. Conn. 1978). Defendants contend that there has been no change in placement, only a transfer of facilities and that plaintiffs have failed to exhaust administrative remedies. On the exhaustion of administrative remedies issue plaintiffs were provided no notice of a right to a hearing. The transfers were presented as a fait accompli. Notice of right to due process hearing which generates the exhaustion issue requires that the status quo remain pending the hearing. See Stuart v. Nappi, supra, 443 F. Supp. at 1240-41. Thus, if notice had been given, defendant would have had to keep P.S. 79 open for these children until after the due process hearing determination. The defendants by-passed the hearing process by their action. Hence no

exhaustion issue can be implicated. On the other hand if the transfer does not, as defendants also contend in the alternative, amount to a new placement which would require notice and hearing, no exhaustion issue is involved. Defendants' argument, therefore, fails however one views the matter and the exhaustion question is not applicable.

What was done seems totally at variance with both the letter and spirit of the federal and state laws designed to provide procedural protection for the handicapped, see Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; Section 5(a) of the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1415; New York Educational Law, § 4402 (McKinney Supp. 1979); Mills v. Board of Education, 348 F. Supp. 886, 880-81 (D.D.C. 1972); Pennsylvania Association for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 303-05 (E.D. Pa. 1972), and support the development of educational practices which provide the handicapped with educational skills to help them develop their capabilities to the greatest extent possible. Boxall v. Sequoia Union High School District, 464 F. Supp. 1104, 1108 (N.D. Cal. 1979); Lora v. Board of Education, 456 F. Supp. 1211, 1225-28 (E.D.N.Y. 1978). The move was made in haste and was beset with the usual bureaucratic snafus, such as sending some of the children to a K-2 school. Coppin of the Division had never inspected P.S. 79, did not know the kind and quality of the programs it was offering and therefore was in no position to attempt to duplicate those programs in the new locations.

It is clear from what has been stated thus far that plaintiffs have met the standards in this circuit for preliminary injunctive relief. They have demonstrated irreparable injury and both the probability of

success on the merits, Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Co., Inc., 476 F.2d 687, 692 (2d Cir. 1973), and that the balance of hardship tips decidedly in their favor. Buffalo Courier-Express v. Buffalo Evening News, 601 F.2d 48, 54 (2d Cir. 1979). Plaintiffs need only show probability of success or balance of hardships in their favor, not both. Ibid.

It does not appear to me that the court should order the defendants to reassign these children to P.S. 79, however, because the staff has been dispersed. The traumas of being moved from P.S. 79 cannot at this late date be cured by a move back. The children have surely been damaged and that cannot be undone. Defendants seem to contend that as long as they are providing special educational classes for plaintiffs at the new locations, they are in compliance with both federal and state law, even if the quality of the courses of instruction at the new locations are not on the level of those provided at P.S. 79. That contention is rejected. Plaintiffs are entitled to special educational offerings at least on the level of those afforded at P.S. 79. Accordingly, defendants are ordered to prepare and structure a program for these displaced children in their new locations designed to provide mainstreaming, self-confidence building, help in dealing with psychological problems, and a healthy opportunity for integration with non-handicapped.

This case is appropriate for class action consideration under Rule 23(a), F.R.Civ.P., on the basis of numerosity, typicality, commonality of issues of law and fact and adequate representative parties. Defendants have acted or refused to act on grounds generally

applicable to the class, satisfying Rule 23(b)(2), and defendants' contention that a judgment will run to all plaintiffs and hence class determination is not necessary will not suffice to deny plaintiffs their right to class action determination. See Rodriguez v. Percell, 391 F. Supp. 38, 41 n.2 (S.D.N.Y. 1975). Accordingly, plaintiffs may maintain this action as a class action on behalf of all handicapped children enrolled in P.S. 79 as of the 1978-1979 school term in various special education classes who were transferred out of that school to other schools and are now attending or are entitled to attend special educational classes and to receive special education instruction within the school district.

SETTLE ORDER.

Dated: New York, New York
February 27, 1980

ROBERT L. CARTER
U.S.D.J.

3/27- Carter J. (25)

Appendix C - Order, United States District Court for the Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CONCERNED PARENTS & CITIZENS FOR THE CONTINUING EDUCATION AT MALCOLM X (PS 79); TONI FRANKS individually and as next friend of TONY FRANKS; GEORGIA KEY individuallyand as next friend of TYRONE KEY; INA WILLIAMS individually and as next friend of DETRA WILLIAMS; EVA KILLING VARGAS individually and as next friend of EDRA VARGAS; LOUISE WATSON individually and as next friend of JOHN WATSON; MATTIE MITCHELL individually and as next friend of ANTHONY EDWARD MITCHELL; HELEN ROBERTS individually and as next friend of BERNADETTE ROBERTS,

Plaintiffs

-against-

THE NEW YORK CITY BOARD OF EDUCATION; FRANK J. MACCHIAROLA individually and as Chancellor of the New York City Board of Education; JERRY C. GROSS individually and as Executive Director of the Division of Special Education of the New York City Board of Education; THE BOARD OF TRUSTEES OF COMMUNITY SCHOOL DISTRICT #5; WILLIAM ALLEN, SNOWDEN E. EICHELBERGER, LORRAINE C. HALE, JEAN A. HIGGINS, BARBARA C. JOHNSON, and THEODORE MEEKINS individually and as members of the Board of Trustees of Community School District #5.

Defendants.

79 Civ. 6152 (RLC)

ORDER AND JUDGMENT

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This case having come before the Court on plaintiffs' motions for class certification and preliminary injunctive

relief and defendants' motion to dissolve the temporary restraining order previously issued by this Court, and the Court having issued a written opinion on February 27, 1980, certifying the plaintiff class and granting in part the relief prayed for, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. Plaintiffs' mo tion for class certification pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure is granted, the class to be composed of all handicapped children who were attending special education classes at P.S. 79 during the 1978-79 academic year, and the parents and guardians of these children.

2. Plaintiffs' motion for preliminary injunctive relief is granted in part and denied in part; defendants' motion to dissolve the outstanding temporary restraining order is granted.

3. As used in this Order and Judgment the term "change in placement" shall mean any significant alteration in the programs, activities, or services provided by defendants to handicapped children. It shall include changes in the degree to which handicapped children are integrated with non-handicapped children in these programs and activities, as well as significant changes in curriculum, extra-curricular offerings, class composition, and teacher assigments.

4. Defendants' transfer of the plaintiff children from P.S. 79 constituted a change in placement in violation of the Education for all Handicapped Children Act ("EHA"), 20 U.S.C. §1401 et seq.

5. Defendants' shall refrain from subjecting the plaintiff handicapped children to any further changes in placement without first according plaintiffs the procedural rights guaranteed by the EHA (20 U.S.C. §1415) and regulations promulgated thereunder (45 C.F.R. §121a.50 et seq.), the Rehabilitation Act (29 U.S.C. §794) and regulations promulgated thereunder (45 C.F.R. §84.36), and state law (N.Y. Educ. Law §§4402-4404 (McKinney)). These rights include, inter alia:

(a) Prior written notice to the parent or guardian of each handicapped child whenever defendants propose to initiate a change in the child's educational placement or in the provision of educational services to the child. Such prior written notice shall inform the parent or guardian [in his or her native language] of all the statutorily mandated hearing procedures, the reasons for the action proposed, and a description of any other actions which were considered and rejected.

(b) An impartial due process hearing if the parent or guardian objects to the proposed change, at which the parent or guardian is entitled to be assisted by counsel and by experts in special education, to present evidence, compel attendance of witnesses and engage in cross-examination.

(c) A verbatim transcript of the due process hearing referred to in part (b) above.

(d) A written decision following the hearing, including findings of fact.

(e) An appeal to a state court or federal district court, which shall have the authority to hear additional evidence and base its decision upon a preponderance of the credible evidence.

6. During the pendency of all proceedings referred to in paragraph 5, there shall be no change in a child's placement without parental consent.

7. Defendants shall take all actions necessary to provide to the plaintiff children in each of their current placements those curricular and extra-curricular programs and related services which were available to plaintiff children at P.S. 79, including but not limited to the following:

(a) A peer tutoring program in which handicapped children shall have the opportunity to tutor non-handicapped children;

(b) The Afro-American Caravan Program;

(c) The Young Audience Program;

(d) The World Poets Resource Center;

(e) A science fair;

(f) Choral groups;

(g) Assembly programs in which the handicapped children participate as well as observe;

(i) Dance and art festivals;

(j) A library trip program;

(k) An audio-visual squad;

(l) A school book fair;

(m) Weekly radio broadcasts in conjunction with a local radio station;

(n) The President's Physical Fitness Program;

(o) Basketball and track teams;

(p) Cheerleading squads;

(q) Boy and Girl Scout troops;

(r) Queens College Teacher Corps Program;

(s) City University student teacher program;

(t) Flower Fifth Avenue On-Site Developmental Disabilities program;

(u) A fully-equipped resource room;

(v) Title I and Title VI reading programs;

(w) Physical education classes.

8. Defendants shall further provide to the plaintiff children in each of their current placements those related services which were available at P.S. 79 and which are required by the children's Individualized Educational Programs, including but not limited to the following:

(a) Individual psychological counseling;

(b) Crisis intervention counseling;

(c) Guidance and social counseling;

(d) Joint counseling activities involving the handicapped children, their parents, teachers, and school psychologists.

All of these related activities shall be provided by fully qualified and certified personnel who shall be available to the children to no lesser extent than they were at P.S. 79.

mitted to participate with non-handicapped children in at least the following activities:

(a) lunch period;

(b) gym classes;

(c) recess;

(d) assembly programs.

14. In the event that the current staffs at the various schools to which plaintiff children have been assigned are insufficient to comply with the provisions of this Order, defendants shall recruit and hire such number of qualified professionals and other staff members as is required to effectuate this Order.

15. In any instance where defendants are unable to implement the programs, services and activities required by this Order because of lack of staff, equipment, or facilities, defendants shall enter into contracts with non-Board of Education organizations or facilities to provide such programs, services, and activities. Defendants shall immediately take all steps necessary to negotiate such contracts, and make maximum reasonable efforts to obtain all necessary approval to assure compliance with the provisions of this Order.

16. Thirty days following entry of this Order and once each month thereafter as long as this Order is in effect, defendants shall provide a report to the Court, with a copy to plaintiffs, setting forth in detail all steps taken to comply

with this Order. Such reports shall include, inter alia:

(a) A list of all programs and services offered to student class members, including a description of the program, schools where the activity or program is offered, numbers of children taking part, and degree of integration with non-handicapped students. Defendants shall list all of the programs and services explicitly enumerated in this Order and indicate the extent to which each of these programs and services has been implemented.

(b) With regard to any program or service required by this Order that defendants have not implemented as of the date of the report, they shall set forth the reasons for failing to do so and list any substitute programs or services provided. For any substitute programs or services, defendants shall supply the information required in subparagraph (a) above and, in addition, shall indicate why they believe the substitute program or service is of similar quality and enhances the same skills as the program or service for which it has been substituted.

(c) With regard to social, psychological, and crisis counseling referred to in paragraph 8 above, defendants shall identify by name, title, and type of certification each staff member providing such services in each school. Defendants shall also identify the number of children for whom each such staff member is responsible and indicate whether the staff member is assigned to each school on a full-time basis.

(d) With regard to each of the activities listed in paragraphs 7 and 13, defendants shall indicate whether, in each school, such activities are fully integrated, with handicapped and non-handicapped children participating together. To the extent that any such activities are not fully integrated, defendants shall state the reasons for the failure to integrate and set forth plans for integrating the activities promptly.

17. The temporary restraining order enjoining defendants from modifying the physical facility at P.S. 79 is dissolved.

18. This Order shall remain in full force and effect until final disposition of this action.

19. The terms of this Order and Judgment shall bind all defendants, their successors in office, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of this judgment by personal service or otherwise.

20. The issues of the award of reasonable attorneys' fees, costs, and disbursements herein are reserved for later determination by this Court, upon appropriate motion.

21. This Court retains jurisdication over this action for all further proceedings and for the purpose of issuing any orders which may be necessary for the construction, implementation, or enforcement of this Order and Judgment or of any provisions thereof.

Robert L. Carter
United States District Judge

Dated: New York, N.Y.

JUDGMENT ENTERED
Raymond F. Burghardt
Clerk

Appendix D - Policy Memorandum OSPR I/1/45, reprinted from 2 EHLR 259:05, with explanatory material from 2 EHLR 259:01

POLICY DIGESTS OF OFFICE OF STANDARDS, POLICY AND RESEARCH

Editorial Note: The Office of Standards, Policy and Research (OSPR) of the Office for Civil Rights writes policy memoranda concerning specific cases referred to OSPR for review by the regional offices or Office of Compliance and Enforcement. Reproduced in this section are digests of those memoranda concerning § 504 of the Rehabilitation Act of 1973. The digests are prepared by the Division of Standards and Policy Review and are collected by issue number and volumes.

Note on Format: Within the OSPR volume, the policy digests are identified only by page number; they have no numerical code numbers. The policy digests reproduced below, therefore, have been edited to include a numerical identifier and to remove the full text of the § 504 regulation that is cited by OSPR as authority for each interpretation. The identifier, which is included at the beginning of the policy digest, takes the following general format: OSPR I/1/—. "OSPR" identifies the policy digest as originating in the Office of Standards, Policy and Research; the roman numeral "I" refers to the Policy Digest Volume number; the arabic numeral "1" refers to the issue number within the Volume; and the final arabic numbers denote the page within the issue number and volume of the Policy Digest where the specific policy digest is located.

OSPR I/1/45
April 20, 1979

Issue: A change in the location of a special education program as a "change in educational placement."

Facts: A school district relocated a special education program which necessitated transferring children from one school district to a separate school district.

Decision: In this case, the change in school site does constitute a significant change in the children's educational placement. Ordinarily, a mere change in the physical location will not be a significant change in educational placement, unless there are changes in the nature or quality of the educational services being delivered.

The fact that the children in this case are being transferred from one school district to another school district is dispositive. Sending handicapped children out of their own school district for their education is a significant change in placement and therefore necessitates the availability of procedural safeguards.

Authority: Regs. 84.35, 84.36.